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ABSTRACT

In 1996 and 1997, the Supreme Court declared five acts of Congress to be unconstitutional. An overview of these decisions is offered in this article. It opens with a discussion of those acts that violated the First Amendment. These decisions dealt with the constitutionality of Arizona's "official English" statute; the Communications Decency Act, which criminalized the knowing transmission of obscene or indecent messages over the Internet to any recipient under 18; and a case involving the establishment of religion in the schools. Other cases involved Fourth Amendment rights, due process, and Congressional powers under Article 5 of the 14th Amendment, which relates to the Congressional Act that requires states and local jurisdictions to justify any restriction which "substantially burdens" the free exercise of religion by showing that the restriction furthers a compelling state interest and is the least restrictive means of furthering that interest. Cases that pertained to the 11th Amendment are also addressed: universities' immunity to a breach-of-contract action, municipal liability for single acts of employees, an appeal of interlocutory orders, and components of Title VII of the Civil Rights Act of 1964. Other acts affected by Court decisions included the Voting Rights Act, the Fair Labor Standards Act, the Individuals with Disabilities Act, and Title IX of the Education Amendments of 1972. (RJM)

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Inquiry & Analysis

The Bimonthly Publication of the NSBA Council of School Attorneys

Supreme Court In Review – 1996-97

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Supreme Court In Review – 1996-97

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This may be the first year that the Court's "conservative" wing can declare a decided victory. The term "conservative" here certainly does not mean "status quo" or "don't rock the boat." Congress' boat encountered more tidal waves than it has since at least the New Deal if not before, with five Acts of Congress being declared unconstitutional. In addition, no major decision rejected states' rights.

FIRST AMENDMENT – FREE SPEECH

Constitutionality of Arizona's "Official English" Statute

The case of *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), involved a challenge to Arizona's statute requiring, among other things, state employees to "act in English and in no other language." The district court held the statute unconstitutional and the Ninth Circuit Court of Appeals reversed. Unfortunately, this free speech case resulted in a finding of mootness, leaving the question of the constitutionality of the statute for another day.

Reviewing the complex procedural history of this case, Justice Ginsburg, writing for a unanimous Court, concluded that the original plaintiff in the action, a bilingual employee who handled medical malpractice claims against the State, no longer had standing to sue because she left public employment after the district court rendered its decision. The Court, however, did not let the district court decision stand because it ruled that the Arizona Attorney General, although not a party to the action, had a right under 28 U.S.C. § 2403(b) to present arguments on appeal "on the question of constitutionality."

The Court noted that the Arizona Supreme Court has before it the question of whether the statute can be interpreted in a constitutional way. Given the importance of that decision to the conduct of the State's business, Justice Ginsburg noted that the district court should have certified the question to the state courts, before rendering a decision on the statute's constitutionality.

Constitutionality of Communications Decency Act

The Communications Decency Act passed by Congress in 1996 criminalizes the knowing transmission of "obscene or indecent" messages over the Internet to any recipient under 18 and prohibits the sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

A three judge district court in Pennsylvania held that the statute unconstitutionally abridges the freedom of speech. In an opinion by Justice Stevens, the U.S. Supreme Court agreed. *Reno v. ACLU*, 117 S. Ct._ (1997) 65 U.S.L.W. 4715 (No. 96-511)(U.S. June 26, 1997).

The Court examined the Internet, agreeing with the district court that it is "no exaggeration to conclude that the content on the Internet is as diverse as human thought." It distinguished the speech in this case from that in other Supreme Court cases upholding speech restrictions designed to protect children. Unlike book dealers who were the subject of *Ginsburg v. New York*, 390 U.S. 629 (1968), the CDA restricts viewing by adults as well as children because there is no way to identify who is viewing the material. Unlike the restrictions in *Ginsburg*, the CDA does not define

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"indecent" and has no limitations regarding artistic or literary merit. The CDA is also not restricted to commercial transactions. The Court also distinguished *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the Court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. That case did not restrict content but rather was aimed at the "secondary effects" such as crime and deteriorating property values that the theatres fostered. The Court also distinguished *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which, unlike the Internet, involved an extensively regulated medium. The Court also pointed out that, unlike the Internet where one has a choice as to whether to enter particular sites, which in the great majority of cases are clearly marked as adult material, one might turn on a radio or television and receive unwanted obscenities.

Even were effective, inexpensive screening software available at this time, which the Court noted is not, under the CDA the transmitter still could be held criminally liable if the recipient failed to use the software. "The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA."

Justice O'Connor, in a dissent in which the Chief Justice joined, parted company with the majority on the question of "adult zones." To the extent that indecent material is knowingly sent only to minors, these justices would uphold the Act. However, that exception is more theoretical than real.

FIRST AMENDMENT – ESTABLISHMENT OF RELIGION

In 1985 Justice O'Connor penned the dissent in *Aguilar v. Felton*, 473 U.S. 402, expressing her disagreement both with the majority's finding regarding the unconstitutional religious effect of New York City's title I program and the Court's reliance on the entanglement prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to invalidate the program. This term Justice O'Connor wrote the majority opinion in *Agostini v. Felton*, 117 S. Ct. _ (1997), 65 U.S.L.W. 4524 (No. 96-552)(U.S. June 23, 1997), in which the Court this time upheld the New York City program and overturned the *Aguilar* decision and that part of *Grand Rapids v. Ball*, 473 U.S. 373 (1985), which had invalidated a similar practice, as "no longer good law."

Justice O'Connor's two opinions look very much alike. In *Agostini* she pointed out that since in *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), the Court abandoned the presumption that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion," there is no longer a need for excessive monitoring by the public schools of the teaching in the private schools and, therefore, no excessive entanglement.

This case was brought under Rule 60(b) which provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application.

The lower courts held that, although it was true at that time that a majority of the current members of the Supreme Court no longer supported the holding in *Aguilar*, since the Court had not overturned the case, it continued to be the law of the land. Although acknowledging the accuracy of the lower courts' analysis, the Court nevertheless reversed, stating that "other courts should [not] *conclude* our more recent cases have, by implication, overruled an earlier precedent." That decision can be made only by the Supreme Court. Justice Ginsburg, in a dissent in which Justices Stevens, Souter and Breyer joined, stated that the Court should not take the extraordinary step of using rule 60(b) as a vehicle for overturning a precedent but instead should postpone that decision until the issue arises in another case. Justice Ginsburg mentioned several cases in the pipeline that raised the same issue.

Justice Souter's dissent questioned the majority's reliance on *Zobrest*, which he opined was not as expansive a ruling as the majority indicated and applied only to sign language interpreters who are akin to hearing aids. Justice Souter believes that the majority has created "fresh law," rather than merely formalizing earlier cases like *Zobrest* and *Witters v. Washington Dep't of Social Services for the Blind*, 474 U.S. 481 (1986).

The big unanswered question is whether the Court has totally undercut constitutional arguments against school vouchers. Perhaps not. Justice O'Connor went to great lengths to maintain that the three-pronged test (purpose, effect and entanglement) is still good law. The only difference, she stated, is "our understanding of the criteria used to assess whether aid to religion has an impermissible effect." The Court no longer holds to the presumption that public employees in private schools results in state religious indoctrination or that all governmental aid that directly aids the religious function of private schools is invalid. There are some important factors that were not present in *Felton*. The money did not go directly to the schools. The public schools maintained control. That would not be the case with a voucher program. The aid in *Felton* was earmarked for supplemental services and did not supplant private school moneys, whereas in voucher programs the money can be used for any purpose. Opponents of vouchers should point out these differences and also individualize their objections to particular voucher programs, rather than relying on presumptions of invalidity.

FOURTH AMENDMENT

A Georgia statute required candidates for public office to submit to a urinalysis test within 30 days prior to qualifying for nomination or election. In *Chandler v. Miller*, 117 S. Ct. 1295 (1997), Libertarian Party nominees challenged the law as a violation of their constitutional right to be free from unreasonable searches.

In an opinion by Justice Ginsburg writing for eight members of the Court, the Chief Justice dissenting, the Court held the law unconstitutional. In absence of a showing of "special needs, beyond the normal need for law enforcement," searches must be based on individualized suspicion. The opinion distinguished *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug tests as a condition of assignment of custom officials to drug interdiction positions or positions requiring carrying of firearms); *Skinner v. Railway Execs Assoc.*, 489 U.S. 602 (1989)(upholding drug tests of railroad employees involved in train accidents); and *Vernonia School District 47J v. Acton*, 115 U.S. 2386 (1995) (upholding school district program for random drug testing of athletes). The state, in this case, made no showing of a problem of drug use among candidates for office, as was the case in both *Von Raab* and *Vernonia*, or of any "concrete danger" as was the case in *Von Raab*, or that the candidates were engaged in a highly regulated industry as in *Skinner*.

School districts continue to wrestle with the question of whether they must show all of the elements present in *Vernonia* in order to prevail in a case challenging student drug testing programs. Although the Court certainly cited *Vernonia* with approval, noting that a school system bears large responsibilities as "guardian and tutor of children entrusted to their care" and that children have a lesser expectation of privacy in the schools than members of the population generally, it also pointed out that the facts in *Vernonia* evidenced an "immediate crisis" and the athletes who were tested were leaders in the school community and considered "role models" for other students. Arguably, school districts cannot rely on *Vernonia* in the absence of a showing of a real problem in the schools and justification for drug testing of the entire student body would bear a greater burden than that in *Vernonia*.

DUE PROCESS

In a unanimous opinion by Justice Scalia, the Supreme Court ruled that a university did not violate the due process rights of a university security officer who was immediately suspended without pay when he was arrested and charged with a felony drug offense. The charges were later dismissed. *Gilbert v. Homar*, 117 S. Ct. 1807 (1997). The Court did not reach the issue of whether the university's post-suspension proceedings were adequate, but it distinguished between the termination of employment in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), where the Court held that the State must provide some type of minimal due process before termination and the facts in this case where the employee was only suspended. In answer to the employee's claim that he should have been suspended with pay, the Court held that as long as the employee receives a "sufficiently prompt post suspension hearing," the government "does not have to give the employee charged with a felony a paid leave at taxpayer expense."

The Court noted that in this case the filing of the felony charges was sufficient pre-suspension notice, but did not address the question of whether pre-suspension notice is required. At the outset of the opinion, Justice Scalia pointed out that the Court has not ruled on the question of whether the protections of the due process clause extend to discipline of tenured public employees short of termination. Thus, it left to another day the issue of whether, for example, a school district is required to provide a *Loudermill* hearing before suspending a teacher without pay upon allegations of child abuse. In addition, there remains a question of whether teachers have a due process right to challenge reassignments which do not involve pay reductions.

CONGRESSIONAL POWERS UNDER § 5 OF THE FOURTEENTH AMENDMENT

In the 1960s and 1970s the cry of "State's rights" was a common theme in the rhetoric of Southern members of Congress and state officials who opposed civil rights legislation passed under the Fourteenth Amendment. That argument was not successful. This term a majority of the Court continued its retrenchment of congressional powers. *City of Boerne v. Flores*, 117 S. Ct. _ (1997), 65 U.S.L.W. 4612 (No. 95-2074)(U.S. June 25, 1997), raises the issue of whether Congress had the power under the Fourteenth Amendment to pass the Religious Freedom Restoration Act (RFRA). The declared purpose of the Act was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." In *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. Relying on its Fourteenth Amendment enforcement powers, Congress passed RFRA which requires states and local jurisdictions to justify any restriction which "substantially burdens" the free exercise of

religion by showing that the restriction furthers a compelling state interest and is the least restrictive means of furthering that interest.

The lower court upheld the constitutionality of the statute, finding that the City of Boerne violated the statute by applying its zoning laws to a church. In an opinion by Justice Kennedy, the High Court reversed, holding that RFRA was not a proper exercise of Congress' § 5 enforcement power. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."

The Court distinguished between civil rights legislation and the legislation at issue here, pointing out that the evils which the civil rights laws were designed to address far outweighed the largely undemonstrated harm with which Congress was concerned in passing RFRA.

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Justice Stevens concurred in the judgment on the ground that RFRA establishes religion because it gives religion a right that those with no religion do not have. There was not one dissent on the basic theory of the majority. The dissenters, Justices O'Connor, Breyer and Souter, argued that the Court should have requested the parties to brief the issue of whether *Smith* was wrongly decided. Justice O'Connor stated that she would have joined the majority if she agreed with *Smith*, which she does not.

This case could have far reaching consequences, given the fact that in the last few years the Court has also limited congressional authority under other powers. Congress passes laws under a number of powers including the treaty clause, the spending power, the commerce clause and the Fourteenth Amendment. The Supreme Court in *U.S. v. Lopez*, 115 S. Ct. 1624 (1995), for the first time in half a century placed limitations on Congress' power under the interstate commerce clause, holding that Congress exceeded its authority when it passed the Gun Free School Zones Act. Last term in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Court overturned an act of Congress which authorized Indian tribes to sue states which refuse to negotiate in good faith over gaming rights. Unlike the statute in *Lopez*, this statute clearly stated Congress' intent to abrogate the states' Eleventh Amendment immunity. Nevertheless, the Court found that Congress overstepped its authority.

Now that the Court has also set limits on Congress' authority under the Fourteenth Amendment, a number of acts may be vulnerable to attack. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), discussed below, which upheld the application of the Fair Labor Standards Act to local governments, is likely to be reversed if an appropriate case comes before the Court. Even the Americans with Disabilities Act may be open to attack. Since the Supreme Court has never held disability to be a "suspect" classification, it is arguable that Congress does not have the power under the Fourteenth Amendment to impose such sweeping affirmative obligations. The spending power is often used by Congress to impose its will on local governments, school districts being one of the prime targets. Perhaps, the High Court will see fit in the future to place limits on this power as well.

ELEVENTH AMENDMENT

In *Regents of the University of California v. Doe*, 117 S. Ct. 900 (1997), the Supreme Court, unanimously reversing the Ninth Circuit Court of Appeals, held that the University of California retains its Eleventh Amendment immunity to a breach of contract action, even though any judgment would be paid by the U.S. Department of Energy under an indemnity agreement. The opinion by Justice Stevens held that the state's "potential" liability, rather than its ability to require a third party to reimburse it, is the relevant consideration. Justice Stevens stated that the fact that a state has insurance does not change its sovereign status.

The respondent requested the Court to go beyond the impact on the state treasury and look at the character of the function at issue in the litigation as well as the extent to which the elected state government controls the university. The Court refused to do so because the question accepted for *certiorari* did not encompass that argument.

SECTION 1983

Municipal Liability for Single Acts of Employees

In *Monell v. Dep't of Social Services of New York*, 436 U.S. 658 (1978), the High Court held that municipalities are "persons" under 42 U.S.C. § 1983 but cannot be held liable under the doctrine of *respondeat superior*. Over the years, a body of sometimes confusing law has grown, defining when a policy or custom justifies holding the municipality liable.

In the most recent § 1983 case to discuss the municipal

liability issue. Plaintiff sought to hold a board of county commissioners liable for the assault and battery committed by a low level sheriff's deputy during a traffic stop. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382 (1997). The deputy was a relative of the sheriff who all parties admitted held a policy-making position. Plaintiff claimed that the sheriff showed deliberate indifference by failing to conduct appropriate screening of the deputy before hiring. The deputy had a record of misdemeanors, including assault and battery.

Justice O'Connor, writing for the majority, distinguished this case from *City of Canton v. Harris*, 378 U.S. 381 (1989), where the Court found the municipality liable for its "deliberate indifference" to the constitutional rights of the plaintiff by its inadequate training of its police officers. Although agreeing that a single hiring decision could give rise to municipal liability under § 1983, the Court held that the decision must itself be unconstitutional. "Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high." The Court refused to adopt Plaintiff's analogy between failure-to-train cases and inadequate screening cases, stating that "[e]very injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense."

The dissent written by Justice Souter, in which Justices Stevens and Breyer joined, expressed dismay over the fact that while the majority agreed that a single act was sufficient, it nevertheless refused to find liability unless the act itself was unconstitutional. In the opinion of Justice Souter, a policy choice "can be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference."

A separate dissent by Justice Breyer, in which Justices Stevens and Ginsburg joined and with which Justice Souter agreed, argued that this case is proof of the need to re-examine the Court's distinction set forth in *Monell* between "vicarious liability" and liability based on policy and custom.

Whether the majority is simply dissatisfied with its rulings in *City of Canton v. Harris* and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), but does not want to reverse them or truly believes in the distinctions it has drawn between this case and its prior cases, this decision does nothing to clarify the body of § 1983 law and has little precedential value.

Appeal of Interlocutory Orders

A former employee of the Idaho Liquor Dispensary sued state officials under 42 U.S.C. § 1983 in state court. The officials attempted to file an interlocutory appeal from the lower court's denial of their motion for summary judgment which alleged qualified immunity. The Idaho Supreme Court dismissed their appeal on the ground that under Idaho law such a denial is not appealable because it is not a final order. The U.S. Supreme Court unanimously agreed. *Johnson v. Fankell*, 117 S. Ct. 1800 (1997).

Although under federal law public officials have the right to appeal a denial of summary judgment on the qualified immunity question, the Court distinguished a state court's duty to follow federal law regarding the ultimate disposition of the case and a situation like this where the State is consistently applying its neutral procedural rules. A state has the ultimate authority over the operation of its courts.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Saving its split decisions for cases raising constitutional issues, the Court ruled unanimously in two technical title VII cases.

Counting Part Time Employees to Determine Who Is an "Employer"

In the case of *Walters v. Metropolitan Education Enterprises Inc.*, 117 S. Ct. 660 (1997), the employer argued that the employee was not covered by title VII because the employer did not have 15 employees during the relevant statutory time period because some of its employees were part-time and were not being compensated "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The employer admitted, however, that on any particular day all of the individuals with whom it has an employment relationship are "employees."

Reversing the court of appeals, the Supreme Court unanimously held that the test for "when an employer 'has' an employee is no different from the test for when an individual is an employee." Since the employer had 15 employees on the payroll during the relevant time, it was covered by the law.

Are Former Employees Protected by Anti-Retaliation Provisions?

Robinson v. Shell Oil Company, 117 S. Ct. 843 (1997), is an appeal from an *en banc* decision of the Fourth Circuit Court of Appeals holding that a former employee is not protected by the anti-retaliatory provisions of title VII. The individual alleged that he was terminated on the basis of his race and that after he filed a complaint with the EEOC, his former employer retaliated by giving him a negative reference. The High Court reversed.

Since the language of title VII is ambiguous as to whether the retaliation provisions apply to former employees as well as current employees, the Court in a unanimous opinion by Justice Thomas, looked at the broader context of the statute and held that the court of appeals' narrow approach would be "destructive of [the] purpose of the anti-retaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under title VII" such as discriminatory termination.

VOTING RIGHTS ACT

Violation of § 2 as a Ground for Denial of Preclearance under § 5

Section 5 of the Voting Rights Act requires certain jurisdictions which had been found guilty of discrimination to preclear with the Department of Justice any changes in voting procedures or districting. The jurisdiction bears the burden of showing that the new practice does not have a retrogressive effect. Section 2, on the other hand, applies to all jurisdictions and bars any voting "standard, practice or procedure" that "results in a denial or abridgment of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a). The question before the Court in *Reno v. Bossier Parish School Board*, 117 S. Ct. 1491 (1997), was whether the Department may refuse preclearance under § 5 if a new voting practice violates § 2. The Court held, with Justices Stevens and Souter dissenting, that it may not.

The Board had two plans before it, the first plan was the same as a precleared plan adopted by the Bossier Parish Police Jury and contained twelve districts, none of which were majority black and the second plan suggested by the NAACP which contained two majority-black districts. The board adopted the first plan, claiming that since the police jury had received preclearance, that plan was more likely to receive clearance and because the NAACP plan would require the Board to split 46 electoral precincts. The Department of Justice, citing "new information," refused preclearance on the ground that the plan violated § 2 because it "unnecessarily limited the opportunity for minority voters to elect their candidates of choice." The Board sued.

The Court, in an opinion by Justice O'Connor, held that the plan should have received preclearance. Under the Attorney General's regulations, preclearance can be denied even where retrogression is not shown if the change would result in a violation of § 2. The Court, although acknowledging that it normally would accord "great deference" to the regulations, in this case it cannot, because Congress made clear that § 2 is not grounds in and of itself for denial of preclearance. The only criterion for § 5 preclearance is whether the new plan results in retrogression, as compared with the old plan. The Court acknowledged, however, that § 2 evidence may be relevant to the inquiry relating to "intent to retrogress," and remanded that issue to the district court, saving for another day the question of whether the plan violates § 2.

Justices Stevens and Souter concurred with the remand but dissented on the majority's resolution of the § 5 issue which, in their opinion, requires the Attorney General to approve a plan which is in clear violation of federal law.

Georgia's Congressional Redistricting

In *Abrams v. Johnson*, 117 S. Ct. _ (1997), 65 U.S.L.W. 4478 (No. 95-1425)(U.S. June 19, 1997), the Court again considered the validity of a plan for Georgia's congressional districting. In *Miller v. Johnson*, 515 U.S. _ , the Court overturned a plan developed by the state legislature because race was the predominant criterion for the drawing of the district lines. That plan had carved out three majority-black (while the majority refers to these districts as "majority black," the dissent uses the phrase "majority African-American") districts. The plan at issue here, drawn by the district court, contains only one. The Court upheld the plan.

Appellants argued that the plan violates the Supreme Court's decision in *Upham v. Seamon*, because it fails to take account of legislative preferences. The Georgia legislature's pre-*Miller* plan contained two majority black districts. The Court, however, discounted that plan because it was "designed as a concession to the Justice Department's max-black policy." The dissent disagreed, pointing out that it is inconsistent to uphold a legislative act that reflects legislative preferences motivated by preferences of "farmers, businessmen, or consumer groups" but to find illegitimate preferences motivated by threats of the Department of Justice. The dissent further contended that there was ample evidence to support a contention that many members of the legislature supported two majority African-American districts, regardless of the position of the Government.

The majority also refused to accept the contention that the plan violated §§ 2 and 5 of the Act. The Court accepted the district court's contention that the black population was not sufficiently compact for a second majority-black district. The dissent argued that the issue is not whether § 2 "requires" a second district but whether there is sufficient evidence to justify a state legislature in "believing" that §§ 2 or 5 required the action. There was ample evidence in the dissent's view to justify the legislature in believing that in the absence of a second majority-African-American district, African-American votes would be sufficiently diluted to violate §§ 2 or 5.

Finally, Appellants argued that the court's plan violated the principle of one person, one vote. The Court disagreed but held that even were that true, the remedy would not be to adopt the constitutionally infirm plan of Appellants.

FAIR LABOR STANDARDS ACT

Public employers continue to wait for the Supreme Court to take another look at the constitutionality of the Fair Labor Standards Act as applied to public employers. Then Justice Rehnquist in his dissent in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), which upheld the Act and overturned *National League of Cities v. Usery*, 426 U.S. 833 (1976), expressed his confidence that the principles of *National League of Cities* will "in time command the support of a majority of this Court." A case before the Court this year, *Auer v. Robbins*, 117 S. Ct. 905 (1997), might have been that case but, unfortunately, the public employer conceded that the FLSA may validly be applied to the public sector.

The case raised the issue of the validity of the Department of Labor's "salary basis" test for determining whether an employee is exempt. The Department's regulations provide that the employee must earn a specified minimum amount which cannot be reduced "because of variations in the quality or quantity of the work performed" with certain exceptions including "penalties imposed . . . for infractions of safety rules of major significance."

In this case Petitioners were sergeants and a lieutenant employed by the St. Louis Police Department. They claim that they are not exempt and, therefore, are entitled to overtime pay because the department has a range of disciplinary sanctions that includes deductions in pay and the department actually subjected one sergeant to a deduction in pay at his request as an alternative to termination of his employment. Although the police department did not contest the authority of the Department of Labor's "salary-basis" test, it argued that the Department did not have the authority to impose the disciplinary-deduction rule on public employers and since the regulation was adopted before public employers became subject to the Act, the regulation should not be applied to public employers. The court of appeals held for the employer on the ground that a "one-time incident" does not defeat the salaried status of the employees.

The Supreme Court affirmed, allowing the employer to reimburse the employee for the disciplinary deduction but the Court refused to address the merits of the contention that the disciplinary-deduction rule is invalid. The Court held that the proper way to contest the authority of the Department of Labor's rule is through a petition to the agency under the Administrative Procedure Act, which authorizes the aggrieved party to appeal to the courts.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Three cases were before the Court on petition for *certiorari* involving the same issue, whether school districts are required by the IDEA to provide services to disabled children on the premises of private schools in which they have been placed by their parents for reasons other than because the school districts failed to provide the child a "free appropriate public education." The school district in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), prevailed although the courts of appeals in *Board of Education of City of Bethlehem v. Rossmoor*, 85 F.3d 1050 (2d Cir. 1997), and in *Unified School Dist. No. 259 v. Fowler*, 107 F.3d 797 (10th Cir. 1997), held that such services must be provided.

After these three petitions were filed, Congress passed the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997), which contains a provision that clarifies this issue. Section 612(a)(10)(A) provides that the only obligation that a school district has to service private school students is to expend an amount "equal to a proportionate amount of *Federal funds made available under this part*." In light of that provision the Department of Justice filed an *amicus curiae* brief in *K.R.* suggesting that the Court grant *certiorari* and remand to the lower court for a determination as to whether the new law changes its decision in the case. The Court did just that in all three cases.

The Fifth Circuit in the case of *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 103 F.3d 385 (5th Cir. 1997), also ruled against the school district in a case involving the same issue. After the school district filed a motion for rehearing *en banc*, the court asked the U.S. Department of Education to brief the issue. After Congress passed the new IDEA, the Department of Justice filed a brief supporting the school district. Just days after the Supreme Court's remand in the three cases before it, the Fifth Circuit panel reversed itself and ruled in favor of the school district.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

The Court denied *certiorari* in an important title IX case in which the Fifth Circuit ruled that a school district cannot be sued for damages under title IX by a student who alleges she was sexually harassed by other students, *Rowinsky v. Bryan ISD*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

Another title IX *certiorari* denial is also worth mentioning. In *Brown University v. Cohen*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997), the university challenged, among other things, the U.S. Office

for Civil Rights' three-part test for determining compliance with the athletics participation opportunity requirements of the Department of Education's title IX regulation.

NEXT TERM

Two title VII cases of interest to schools are on the Court's agenda for the 1997 term. *Oncale v. Sundowners Offshore Services*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1480 (1997), raises the issue of whether same-sex harassment constitutes "sexual harassment" under title VII of the Civil Rights Act of 1964. Both parties agree that this is not a sexual orientation case. The outcome of the case may affect title IX. Currently OCR interprets title IX to include, for example, taunts using sexual references and innuendo by female students against another female student.

Piscataway Township Board of Educ. v. Taxman, 91 F.3d 1547 (3d Cir. 1996)(*en banc*), *cert. granted*, 117 S. Ct. 2506 (1997), is touted by Supreme Court observers as the most important case of the new term. That case raises the question of whether a school district that used race as a "plus factor" in selecting which of two equally qualified and equally tenured teacher to layoff, violated title VII. The U.S. Solicitor General in another switch in its position filed a brief contending that Piscataway violated title VII but urging the Court to narrow its decision to layoffs.

Case Notes

School district is not entitled to summary judgment where there are genuine issues of material fact whether action taken against school social worker was caused by his complaints about the illegality of the district's child abuse reporting policy and its discriminatory implementation with regard to Native American school children.

Cobrit v. Minneapolis Public Schools, No. 96-4181 (8th Cir. August 18, 1997)

School social worker filed suit alleging that school district's decision not to rehire him and then subsequent rehire and assignment to a school he considered less desirable with additional duties constituted unlawful retaliation for his criticism of the school district's child abuse reporting policy. The district court granted summary judgment to the district on the claims he asserted under the First Amendment and the state whistleblower protection act.

On appeal the Eighth Circuit reversed. The appeals court said that statements regarding the proper approach to the problem of child abuse and the merits of using racial classifications in public policy decisions are subjects which constitute matters of public concern. The fact that the statements were made solely to the employer and not to outsiders does not deprive them of First Amendment protection. The employer's speculation that the statements were self-motivated in order to deflect responsibility for the employee's own actions does not necessarily remove the public concern element from the speech. Where there is evidence creating a genuine issue of material fact as to whether the speech in question motivated the district to take action against the employee and whether the action would have taken place even in absence of the comments, summary judgment should not have been granted. The Eighth Circuit likewise ruled that there were genuine issues of fact on whether the district had retaliated against the plaintiff for reporting a violation of state law, an action protected by the state whistleblower protection law.

School board did not violate First Amendment by terminating non-tenured teacher who had sent her supervisors a memorandum complaining about the approach taken with regard to classroom discipline.

Wales v. Board of Education of Community Unit School District 300, No. 97-1062 (7th Cir. July 21, 1997)

Teacher who worked in an inclusion facility had difficulty maintaining discipline in her classroom and sought to have at least two children removed. Although she succeeded in having one child moved, when her attempt to have a second child sent elsewhere failed she took medical leave during which she sent her principal and superintendent a memorandum complaining about what she viewed as lack of effective disciplinary procedures regarding disruptive children. After she received unfavorable evaluations, the board decided not to renew her contract. Following arbitration and an investigation by the Office for Civil Rights that concluded with results unsatisfactory to the teacher, she filed suit alleging that the district had violated her First Amendment rights by terminating her based on the discipline memo. The lower court ruled in favor of the district, and the teacher appealed.

The Seventh Circuit affirmed the district court's ruling. Recognizing that a school is entitled to insist that its staff carry out the educational philosophy espoused by the elected school board and the principal the board appoints, the appeals court said that the memorandum at issue could be useful to a school in determining how a teacher runs her classroom. A school is permitted to consider such an